IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 245 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PATEL BECHARBHAI RANCHHODBHAI

Versus

DIKES NATWARLAL PATEL

Appearance:

1. Civil Revision Application No. 245 of 2004

MR DP KINARIWALA for Petitioner No. 1

MR PS PATEL for Respondent No. 1-2,4

DELETED for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 13/12/2004

ORAL JUDGEMENT

1. Rule. Learned Advocate Mr.P.S.Patel waives

service of notice of rule on behalf of respondent nos.1, 2 and 4.

2. By this Revision Application under Section 115 of the Code of Civil Procedure, the original plaintiff challenges the order dated 30th September,2002 passed in Special Civil Suit No.283 of 2000 below Applications Exh.6 and Exh.7.

3. By Application Exh.6, a prayer was made on behalf of the plaintiff to join persons named in Para.3 of the said Application as party defendants and by Application Exh.7, a prayer was made to set aside the dismissal of suit against defendant nos.1, 3 and 4 and to serve the summons on the said defendants by substituted service. By the impugned order, both the Applications came to be rejected and, therefore, this Revision Application.

4. Heard learned Advocate Mr.Kinariwala and learned Advocate Mr.Patel for the parties.

5. A reading of the order makes it clear that a hyper technical approach is adopted by the Court below while deciding the Applications. Plain reading of Order 9 Rule 2 and Rule 4 of the Code of Civil Procedure would make it clear that Application Exh.7 in the present case would be covered by these provisions wherein the order of dismissal was passed on account of non-payment of process fees and it was, therefore, open for the plaintiff to either bring a fresh suit or to apply for setting aside the dismissal. The Court below has rejected the Applications on the ground that when the suit is dismissed for want of payment of process fees, the plaintiff can bring a fresh suit subject to Law of Limitation under Order 9 Rule 5 Sub-Rule 2.

6. It is vehemently contended by learned Advocate Mr.Kinariwala and it reflects from the order also that the record was not traceable for quite some time because of shifting of matters due to earthquake and in such an eventuality, it would be too harsh on a litigant to render him non-suited on such technical plea of the other side.

7. In the opinion of this Court, the Court below ought to have allowed Application Exh.7 and restored the suit as well as joined the parties against whom suit was dismissed and suit should have been permitted to proceed further. The order, therefore, cannot be permitted to stand. The Revision Application deserves to be allowed and the same is allowed. The order impugned herein is

set aside as far as it relates to Exh.6 and Exh.7. Rule made absolute accordingly with no order as to costs. Direct service is permitted.

(A.L.Dave,J.)

(vipul)